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# In the Supreme Court of the United States

OCTOBER TERM, 1958

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LEON ROSENFIELD, as Administrator d.b.n.c.t.a. of Estate of GEORGE D. BEASTON, Deceased, PETITIONER,

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the District Court (Pet. 13-19; R. 15-21) is reported at 156 F. Supp. 780. The opinion of the Court of Appeals (Pet. 20; R. 24) is reported at 254 F. 2d 940.

### JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1958. (R. 26.) The petition for a writ of certiorari was filed on August 2, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## QUESTION PRESENTED

Whether the petitioner is bound by the election made by the executor on the return to have the value of the assets in the gross estate determined under the optional valuation provisions of Section 811(j) of the Internal Revenue Code of 1939.

## STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States——

* * * * *

(j) *Optional Valuation.*—If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed by the executor (or, in the case of property included in the gross estate under subsection (e), (d), or (f) of this section, distributed by the trustee under the instrument of transfer), or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one

year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 811 (j).)

Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939:

Sec. 81.11 *Optional valuation date.*—In general, the object of subsection (j) of section 811 is to make provision whereby the amount of tax otherwise payable may be lessened when, within the year following the decedent's death, the gross estate has suffered a shrinkage in its aggregate value.

The executor may, by an election upon his return, Form 706, if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law, have the property which was included in the gross estate on the date of the decedent's death valued as of the applicable dates, as follows:

* * * * *

(b) Any property not distributed, sold, exchanged, or otherwise disposed of within such 1-year period, valued as of the date one year after the date of decedent's death;

* * * * *

The election of the executor to have the gross estate valued in accordance with the method authorized by

section 811(j), in order to be effective, must be made on the return filed within 15 months from the decedent's death or within the period of any extension of time granted under the provisions of section 81.69 or 81.70 of these regulations. Unless the executor makes such election, all property included in the gross estate must be valued as of the date of the decedent's death. In no case may the election be exercised, or a previous election changed, after the expiration of the time for the filing of the return. The election applies to all the property included in the gross estate on the date of the decedent's death. It cannot be applied only to a portion of such property.

In every case where the election is exercised, the return, Form 706, must set forth (1) an itemized description of all property included in the gross estate on the date of the decedent's death, together with the value of each item as of that date, (2) an itemized disclosure of all distributions, sales, exchanges, and other dispositions of any of the property during the 1-year period after the decedent's death, together with the dates thereof, and (3) the value of each item of property determined in accordance with the provisions of subsection (j). * * *

STATEMENT

The pertinent facts, as shown by the stipulation of facts (R. 2-3) and as found by the District Court (Pet. 13-15; R. 15-17), are as follows:

George D. Beaston died testate on July 25, 1950. During the year after his death, some of the securities held by his estate increased in value, others decreased, and the remaining ones did not change in value. The aggregate amount of the increases during that period

exceeded the amount of the decreases by some $40,000. (Pet. 13; R. 2, 15.)

On August 27, 1951, the executor for the estate filed an estate tax return which had been prepared by the attorney for the estate (Pet. 13-15; R. 15-17.) On the form on which such return was made, the following question was asked (Pet. 14; R. 16):

> Does the executor elect to have the gross estate of this decedent valued in accordance with values as of a date or dates [1] subsequent to the decedent's death as authorized by section 811(j) of the Internal Revenue Code? * * *

That question was answered "Yes" on the return. In testifying in regard to this, the attorney for the estate stated that "Yes" was the answer intended to be given to the question. But he indicated that he had mistakenly believed that by electing the optional valuation date the estate could choose whichever date was more advantageous for each individual asset. Thus, under the column on the return headed "Value under option", he entered the value at the date of death for the assets which had increased in value during the year after death, and the value at the end of the year for those which had decreased or remained unchanged, and used the total of this hodgepodge of values as the optional valuation for the estate. As the Commissioner did not approve this method of determining the optional valuation, he assessed a deficiency in estate tax. (Pet. 14-15; R. 2, 16-17.)

After the payment of that deficiency, and rejection of a claim for refund (except for a minimum portion of

[1] When the optional date is selected, all assets disposed of within a year after death must be valued as of the date of disposal.

the tax relating to an issue not involved here), the administrator d.b.n.c.t.a., who had succeeded the deceased executor, filed this suit to recover the balance of the deficiency. The District Court sustained the Commissioner's determination, and entered judgment for the United States. (R. 21-22.) The judgment of the District Court was affirmed by the Court of Appeals. (R. 26.)

## ARGUMENT

The court below was correct in holding that the executor made a binding election to have the assets in the gross estate valued as of the date one year after the decedent's death.

Section 811(j) of the Internal Revenue Code of 1939, *supra*, allows an optional valuation date as an elective alternative to the valuation of the assets at the date of death. The requirements it sets forth are (1) that the executor shall make an election upon the estate tax return, and (2) that he must file such return within tl prescribed time. If those requirements are met, Section 811(j) provides that "the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death."

Section 81.11 of Treasury Regulations 105, *supra*, issued pursuant to Section 811(j), reiterates the statutory requirements and provides that "In no case may the election be exercised, or a previous election changed, after the expiration of the time for the filing of the return." Section 81.11 also provides that in every case where the election is exercised, the return, Form 706, must set forth an itemized description of all property included in the gross estate on the date of the decedent's

death and "the value of each item of property determined in accordance with the provisions of subsection (j)."

Petitioner has accepted this regulation as a proper interpretation of the statute, as have the courts below. Moreover, petitioner does not object to the form on which the estate tax return was filed, and which asked the question whether the executor was electing to have the gross estate of the decedent valued in accordance with a value as of a date subsequent to the decedent's death as authorized by Code Section 811(j). It is admitted that this question was answered "Yes" on the return, and that such return was filed within the time prescribed by law. Thus, the statutory requirements for election were met and under the applicable regulation, which petitioner has not questioned, the election may not be changed or abandoned now since the time for filing the return expired long before the refund claim was filed.

There is no ambiguity or uncertainty on the return. Not only did the answer to the above question on the form specifically indicate that an election to use the optional valuation was being made by the executor, but this was also shown by the entry of the values for each asset in the column on the return headed "Value under option" as well as in the column headed value at the date of death. As the District Court found (Pet. 15; R. 17), such entries are not only consistent with, but also confirm, the testimony of the executor's attorney that the estate intended to elect the optional valuation date. Furthermore, the attorney's explanation that he had never prepared an estate tax return before and did not know how to correctly compute the optional

valuation does not affect the election which was made or prevent it from being binding. It may have been unwise to make such an election but, if so, that is not a ground for relief by the courts.

Consequently, petitioner is in error in contending that, since the attorney acted under a mistake as to the manner of computing the optional valuation of some of the assets, no effective election was made. *Meyer's Estate* v. *Commissioner*, 200 F. 2d 592 (C.A. 5th), on which he relies, is distinguishable. In that case, the taxpayer-stockholders elected to report gain from a corporate liquidation as taxable under 1939 Code Section 112(b)(7) rather than under the usual procedure of Code Section 115(c). According to the stipulation of facts, that election was made because the taxpayers believed the earned corporate surplus was small but subsequently they found that the surplus was quite large. In view of this mistake of fact, the court allowed the taxpayers to change their election. In the instant case, however, there is no comparable situation for there was a full and correct disclosure of the facts.

In *Richardson* v. *Commissioner*, 126 F. 2d 562 (C.A. 2d), on which petitioner also relies, the taxpayer reported gifts in 1932 but indicated on his return that they had been made prior to the effective date of the gift tax provisions of the Revenue Act of 1932. Thus, he did not claim the statutory exemption of $50,000 in reporting gifts for that year but claimed the exemption for gifts made in 1934. However, as the court held that the 1932 gifts were not perfected until after the effective date for the gift tax and were subject to tax, the taxpayer there was allowed to change his position and use the statutory exemption in computing the tax on the 1932 gifts. Obviously, the circumstances as well

as the statutory provisions under which that case arose are different from those here. But if there is an inconsistency, we submit that the *Richardson* case is contrary to the weight of authority.

The rule denying to a taxpayer the right to repudiate his original exercise of an option by election has been applied in a wide variety of situations. See *Scaife Co.* v. *Commissioner*, 314 U.S. 459 (holding that an erroneous valuation of a taxpayer's capital stock on its first return can not be corrected by an amended, untimely, capital stock tax return); *Riley Co.* v. *Commissioner*, 311 U.S. 55 (holding that a taxpayer, which was unaware of the statutory privilege of electing percentage depletion when its first return was filed, could not make such an election on an amended, untimely, return); *Pacific National Co.* v. *Welch*, 304 U.S. 191 (holding that the taxpayer made a binding election when it reported sales on the deferred payment method, and could not change to the installment method after expiration of the time for filing a return); *Hayes* v. *Commissioner*, 161 F. 2d 689 (C.A. 10th) (holding that the election of a widow to file a joint income tax return for herself and deceased husband was binding, although she had no authority to sign his name and later tried to file a separate return); *Boone County Coal Corporation* v. *United States*, 121 F. 2d 988 (C.A. 4th) (holding that, although a corporation treated intangible drilling costs as capital on its original return without making the required statement as to how it elected to treat such costs, it had made a proper election and could not change to another method as it tried to do on an amended return filed out of time); *Binder* v. *Welch*, 107 F. 2d 812 (C.A. 9th) (holding that a husband and wife who elected to file a joint return are bound

by that election, and can not subsequently file separate returns for the year involved). Also see *Lamb* v. *Smith*, 183 F. 2d 938 (C.A. 3d); *Trust Co. of Georgia* v. *Allen*, 164 F. 2d 438 (C.A. 5th), certiorari denied, 333 U.S. 856; *Burke & Herbert Bank & Trust Co.* v. *Commissioner*, 10 T.C. 1007; 10 Mertens Law of Federal Income Taxation (Rev.), Section 60.20.

As the option to elect a subsequent valuation date for estate tax purposes is given by Congress as a matter of grace, it must be exercised within the time prescribed by statute; and having been so exercised, as it was here, it is binding upon a taxpayer and cannot be withdrawn after the statutory time has expired.[2]

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER, 1958.

[2] Petitioner asserts (Pet. 9-11) that the election in the instant case did not comply with the requirements of the Regulations to the effect that the option can not be applied only to a portion of the property. However, even if that be so, it does not follow that there was no election at all or that petitioner is entitled to make another one after the expiration of the time permitted by statute.

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